

**Letter of Findings: 04-20100626**  
**Sales and Use Tax**  
**For the Years 2007, 2008, and 2009**

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**ISSUES**

**I. Sales and Use Tax – Imposition.**

**Authority:** IC § 6-2.5-1-1 et seq.; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-8.1-5-1; [45 IAC 2.2-1-1](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Belterra Resort Indiana, LLC, 935 N.E.2d 174 (Ind. 2010).

Taxpayer protests the assessment of tax on its purchases of tangible personal property.

**II. Tax Administration – Negligence Penalty.**

**Authority:** IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

**STATEMENT OF FACTS**

Taxpayer is an Indiana limited liability company ("LLC") doing business in Indiana and Kentucky. Taxpayer, which consists of three individuals, husband, wife, and son, as members/employees, elected to be treated as a partnership. The LLC and all three members are Indiana residents.

The Indiana Department of Revenue ("Department") conducted a sales and use tax audit for tax years 2007, 2008, and 2009. The audit utilized two different approaches in examining Taxpayer's accounts and records. First, the Department examined Taxpayer's capital expenditure account. Next, Taxpayer and the Department also agreed to utilize a statistical sample drawn from the 2008 tax year and projected to 2007 and 2009 to determine Taxpayer's liabilities on its purchases of remaining tangible personal property for those years.

Pursuant to the audit, the Indiana Department of Revenue ("Department") determined that Taxpayer made several purchases without paying sales tax at the time of the retail transactions or self-assessing and remitting to the Department the use tax. As a result, the Department's audit assessed Taxpayer additional use tax, interest, and penalty.

Taxpayer timely protested the assessment and submitted additional documentation to support its protest. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

**I. Sales and Use Tax – Imposition.**

**DISCUSSION**

The Department assessed Taxpayer use tax on its purchases of tangible personal property. Taxpayer, to the contrary, asserts that it was not responsible for the sales/use tax. Specifically, Taxpayer claimed that it was not liable for tax on its purchases of (1) a 2009 Chevy Tahoe, (2) a 1998 Chevrolet Dump Truck, (3) a Finn Straw Blower, (4) diesel fuel, and (5) supplies from Supplier F.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq.

IC § 6-2.5-2-1 provides:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC § 6-2.5-3-2 provides:

(a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

The Indiana Supreme Court, in Indiana Dep't of State Revenue v. Belterra Resort Indiana, LLC, 935 N.E.2d 174 (Ind. 2010), explained that "[t]he use tax is complementary to the sales tax because it ensures non-exempt transactions that have escaped sales tax liability are nonetheless taxed. In fact, Indiana's use tax is primarily designed to reach out-of-state sales of tangible personal property that is subsequently used in Indiana." Id. at 177. (Internal citations omitted).

**A. 2009 Chevy Tahoe.**

The Department's audit assessed one (1) percent use tax on Taxpayer's purchase of the 2009 Chevy Tahoe

because Taxpayer purchased this vehicle from a Kentucky dealership, where six (6) percent Kentucky sales tax was collected. Taxpayer, to the contrary, asserted that it paid sales tax at the time of the purchase and, therefore, it was not responsible for Indiana sales/use tax, which is seven (7) percent of the purchase price.

As mentioned above, Indiana "use tax" is designed to reach out-of-state sales of tangible personal property that is subsequently used in Indiana and is "complementary to the sales tax because it ensures non-exempt transactions that have escaped sales tax liability are nonetheless taxed."

In this instance, Taxpayer claimed that it has an office in Kentucky but did not provide any documentation to demonstrate that this vehicle was not used in Indiana and, therefore, was not subject to Indiana use tax. The Department's audit noted that Taxpayer and its employees—the drivers of this vehicle—are Indiana residents. Both Taxpayer and the drivers have been filing Indiana income tax returns as Indiana residents. Additionally, the drivers possess Indiana driver's licenses and the vehicle has been primarily used in Indiana. Thus, this 2009 Chevy Tahoe is subject to Indiana use tax, which is seven (7) percent rate of the purchase price. While pursuant to IC § 6-2.5-3-4, an exemption from use tax is granted for transactions where the sales tax was paid at the time of purchase, Kentucky's sales tax rate is one percent lower than Indiana's sales tax rate. Thus, the Department correctly granted Taxpayer the credits against the sales tax paid to Kentucky at the time of the retail transaction, and Taxpayer is responsible for the remaining one percent Indiana use tax.

Since Taxpayer's use of the 2009 Chevy Tahoe is subject to Indiana use tax and it did not self-assess the use tax, the one percent use tax is properly imposed.

#### **B. 1998 Chevrolet Dump Truck.**

The Department assessed use tax on Taxpayer's purchase of the 1998 Chevrolet Dump Truck because Taxpayer did not pay sales tax at the time of the purchase. Taxpayer claimed that it purchased the Chevrolet Dump Truck from an individual, who is not a dealer, and, therefore, it believes it was not required to pay sales/use tax because this transaction was qualified as "casual sale."

As mentioned above, Indiana imposes a use tax on "the storage, use, or consumption of tangible personal property in Indiana, if the property was acquired in a retail transaction, regardless of the location of that transaction or the location of the retail merchant making that transaction." IC § 6-2.5-3-2(a). However, [45 IAC 2.2-1-1\(d\)](#) provides an exemption for "casual sales." The regulation states:

The Indiana gross retail tax is not imposed on gross receipts from casual sales **except for gross receipts from casual sales of motor vehicles and sales of rental property**. A casual sale is an isolated or occasional sale by the owner of tangible personal property purchased or otherwise acquired for his use or consumption, where he is not regularly engaged in the business of making such sales. (**Emphasis added**). Thus, in order to receive the sales/use tax exemption based on the "casual sale" exemption, a taxpayer is required to demonstrate that:

- (1) the transaction is an isolated or occasional sale by the owner of tangible personal property;
  - (2) the owner of tangible personal property purchased or otherwise acquired for his use or consumption;
  - (3) the owner of tangible personal property is not regularly engaged in the business of making such sales;
- and
- (4) the sale is not a sale of a motor vehicle or a sale of rental property.

In this instance, the 1998 Chevrolet Dump Truck is a motor vehicle, and thus the "casual sale" exemption does not apply pursuant to the above mentioned regulation.

Since Taxpayer did not pay sales tax at the time of its purchase, use tax is properly imposed.

#### **C. Finn Straw Blower.**

The Department assessed use tax on Taxpayer's purchase of the Finn Straw Blower because Taxpayer did not pay sales tax at the time of the purchase. Taxpayer claimed that it purchased the Finn Straw Blower from an individual, who is not a dealer, and, therefore, it believes it was not required to pay sales/use tax because this transaction was qualified as "casual sale."

As mentioned above, Indiana imposes a use tax on "the storage, use, or consumption of tangible personal property in Indiana, if the property was acquired in a retail transaction, regardless of the location of that transaction or the location of the retail merchant making that transaction." IC § 6-2.5-3-2(a). However, [45 IAC 2.2-1-1\(d\)](#) provides an exemption for "casual sales." The regulation states:

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Thus, in order to receive the sales/use tax exemption based on the "casual sale" exemption, a taxpayer is required to demonstrate that:

- (1) the transaction is an isolated or occasional sale by the owner of tangible personal property;
  - (2) the owner of tangible personal property purchased or otherwise acquired for his use or consumption;
  - (3) the owner of tangible personal property is not regularly engaged in the business of making such sales;
- and
- (4) the sale is not a sale of a motor vehicle or a sale of rental property.

In this instance, Taxpayer merely submitted a copy of statement from the seller of the item, stating that "[u]nder penalty of perjury, [Seller] hereby state that I sold Finn Straw Blower to [Taxpayer] for the sum of 18K."

However, Taxpayer's documentation only demonstrated that it purchased the item from Seller for \$18,000. Given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer met its burden of proving that it was entitled to the exemption.

Since Taxpayer did not pay sales tax at the time of its purchase, use tax is properly imposed.

**D. Fuel.**

The Department assessed use tax on Taxpayer's purchase of diesel fuel. Taxpayer, to the contrary, claimed that it is not responsible for the tax because it already paid the taxes at the gas stations.

Taxpayer provided copies of the purchase receipts to support its protest. However, none of the receipts match the items described in the audit list. Given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer met its burden of proving that it was entitled to the exemption.

**E. Supplies.**

The Department assessed use tax on Taxpayer's purchase of supplies on January 22, 2008, from Supplier F in the amount of \$826 and noted that there was "no tax on invoice." Thus, the Department audit determined that Supplier F did not collect the sales tax and Taxpayer is responsible for use tax.

Taxpayer, to the contrary claims that it is not responsible for the tax because this "was a payment on a prior invoice and should not have sales tax on the \$826." However, Taxpayer failed to provide documentation to support its protest. Given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer met its burden of proving that the Department's assessment was wrong.

Since Taxpayer did not pay sales tax at the time of its purchase, use tax is properly imposed.

**FINDING**

Taxpayer's protest of imposition of tax on (1) the 2009 Chevy Tahoe, (2) the 1998 Chevrolet Dump Truck, (3) the Finn Straw Blower, (4) diesel fuel, and (5) the supplies is respectfully denied.

**II. Tax Administration – Negligence Penalty.**

**DISCUSSION**

Taxpayer also protests the imposition of the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department.

[45 IAC 15-11-2](#)(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2](#)(c), in part, as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer did not provide sufficient documentation demonstrating that its failure to pay tax was due to reasonable cause.

**FINDING**

Taxpayer's protest is respectfully denied.

**SUMMARY**

For the reasons discussed above, Taxpayer's protest of imposition of tax is respectfully denied. Taxpayer's protest of the imposition of negligence penalty is also respectfully denied.

*Posted: 10/26/2011 by Legislative Services Agency*

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